SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-21
Lower Tribunal No. CF14-003984-XX

MIGUEL ANGEL NIEVES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Polk County.
J. Kevin Abdoney, Judge.

June 12, 2023

PER CURIAM.

AFFIRMED.

STARGEL and WHITE, JJ., concur.
COHEN, J., dissents, with opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED

COHEN, J., dissenting, with opinion.

Miguel Nieves appeals following the denial of his motion for postconviction relief, raising several claims of ineffective assistance of counsel.[1]

At Nieves's trial, the judge instructed the jury that it could not convict Nieves of burglary unless it found, beyond a reasonable doubt, that, "at the time of entering or remaining in the structure, the Defendant had the intent to commit an offense therein." Three years prior to Nieves's trial, however, that standard instruction was changed to require that the defendant have "the intent to commit an offense *other than burglary or trespass*[.]" *In re Standard Jury Instructions in Crim. Cases--Rep. No. 2012-01*, 109 So. 3d 721, 724 (Fla. 2013) (emphasis added). This language was added to make clear to jurors that the "offense intended cannot be trespass or burglary." *Id.*

Nieves's trial counsel failed to object to the trial court's deviation from the standard instruction. After an evidentiary hearing, the trial court ruled that counsel's performance was deficient for failing to object to the jury instruction provided to the jury, but Nieves had not shown that this deficiency prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that a deficiency in the assistance of counsel will not result in relief unless the defendant can show prejudice).

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

According to *Strickland*, prejudice exists if counsel's performance was deficient enough to "undermine confidence in the outcome," even if it "cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

This case meets the *Strickland* standard for prejudice. Nieves's entire defense at trial was that he had no intent to commit any crime when he entered the home. Under the appropriate jury instruction, the intent to commit a trespass does not constitute burglary. Entry into the home was accomplished stealthily, and I do not dispute that there was sufficient evidence to support a conviction for burglary. The State focuses on the method of Nieves's entry into the home and actions when confronted by the victim to find a lack of prejudice. That focus misses the point.

If, as in this case, the jury may convict if it finds the defendant intended to commit any offense in the house and the defendant concedes that he was trespassing, a conviction of burglary is all but a given. On the other hand, if the jury is told that to convict it must find the defendant intended to commit some crime in addition to trespass, the legal landscape of the trial is dramatically different. While Nieves's trial counsel made this argument to the jury, there was no instruction from the court that supported that argument.

If the failure to instruct the jury on the issue that went to the heart of the defense, particularly when such an instruction is contained in the standard jury instructions, does not "undermine confidence in the outcome" it is hard to understand what would.

In *Grant v. State*, 311 So. 3d 156 (Fla. 2d DCA 2020), a homeowner discovered the defendant standing in her kitchen, next to a kitchen drawer he had opened. The intruder gave a rambling explanation before he left the home. At trial, the judge gave the same burglary instruction as was given in this case, omitting the same language from the burglary instruction as was omitted here. Grant's conviction was reversed on appeal. The only significant difference between *Grant* and the present case is that Grant entered through an open door wearing a black knit hat while Nieves, allegedly, entered through a cut screen door with his hat in his hand.[2] Despite this, the *Grant* court found the incomplete jury instruction error to be sufficiently prejudicial to reverse a conviction.

I also agree with Nieves that the failure to object to inadmissible testimony of uncharged collateral crimes constituted deficient performance. The unobjected-to testimony from Officer Tew of the Bartow Police Department reads:

[2] No one observed Nieves cutting the screen. In a statement to the police, Nieves claimed to have seen a suspicious person at the home.

> Q. Do you recall if (victim) mentioned to you any concerns that she may have had about Mr. Nieves having worked at Lowe's and possibly having made a key to her house?
>
> A. Yes, I do believe she mentioned that because they had previous burglaries.
>
> Q. And was that perhaps why she changed the locks after this?
>
> A. Yes.

There is no dispute that this testimony was inadmissible. Given the context of the questioning, the only logical conclusion that can be drawn was an effort by the State to link Nieves to prior burglaries at the home. There would be no other reason to ask about the victim's concern that Nieves worked at Lowe's.

We apply an objective standard of reasonableness when determining whether trial counsel's performance fell below the standard guaranteed by the Sixth Amendment. *See Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010) (citing *Strickland*, 466 U.S. at 687). The defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 687 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).[3]

[3] When asked why she did not object, Nieves's counsel was unable to offer an explanation.

The State's argument that the decision not to object was strategic fails. The "strategy" suggested is that Nieves's trial counsel used the testimony to point out inconsistencies with the State's theory during her closing argument.

In *Botto v. State*, 307 So. 3d 1006 (Fla. 5th DCA 2020), the Fifth District Court of Appeal tackled a similar issue. A videotaped interview was played for the jury in which the victim identified a previous instance of molestation by the defendant. Defendant's trial counsel failed to object, and in her closing, she urged the jury to consider the inconsistencies between the discussion of this previous instance and other evidence. Under those facts, neither the trial court nor the appellate court had difficulty finding her performance deficient. *Id.* at 1011.

As in *Botto*, I have no problem finding counsel's performance was deficient. Failing to object to testimony for the purpose of pointing out inconsistencies with the State's evidence is not "sound trial strategy" when that same testimony implicates the defendant in previous similar uncharged crimes.

The postconviction court also noted that, had counsel objected to the testimony, it would have "highlighted and drawn more attention to the suggestion that Defendant may have been involved with a previous burglary at the home." However, that suggestion was clear from the testimony itself. By failing to object, Nieves's trial counsel permitted the jury to consider it.

The prejudicial impact of this deficient performance is readily apparent, as "[t]he improper admission of similar fact testimony is presumed to be harmful error." *Id.* (quoting *Pastor v. State*, 792 So. 2d 627, 630 (Fla. 4th DCA 2001) (citing *Holland v. State*, 636 So. 2d 1289, 1293 (Fla. 1994); *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990); *Leverett v. State*, 696 So. 2d 519 (Fla. 4th DCA 1997)). The testimony was clearly elicited for the purpose of showing that Nieves had the propensity to commit the burglary here.

Both the failure to obtain a standard jury instruction and the failure to object to the introduction of testimony of uncharged collateral crimes demonstrate deficient performance by counsel and prejudice. I would remand for a new trial.

William R. Ponall, of Ponall Law, Maitland, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Blain A. Goff, Assistant Attorney General, Tampa, for Appellee.